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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 685

UNION RAILWAY COMPANY,
Petitioner,

vs.

SWIFT & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Union Railway Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 12, 1968.

OPINIONS BELOW

The memorandum opinion of the District Court is unreported and is printed in Appendix B hereto, *infra*, p. A2. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. A11, is reported in 396 F. 2d 798 (6th Cir. 1968).

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1968. Timely petition for rehearing was denied on July 26, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

I. Whether a decision of a trial court sitting without a jury in a diversity case, as to the meaning of a contract under the law of the forum state, may be reversed where the decision is not "clearly erroneous."

II. Whether the United States Court of Appeals for the Sixth Circuit has decided important questions of Tennessee law in a way which conflicts with applicable Tennessee decisions.

RULE INVOLVED

The Federal Rule of Civil Procedure involved is Rule 52(a), 28 U. S. C. following §2906, printed in Appendix A, *infra*, p. A1.

STATEMENT OF THE CASE

A wrongful death action was filed against Union Railway Company on June 9, 1965, seeking damages for the death of Union's employee, Eades, who had been crushed between Union's train and a feed mill belonging to Swift & Company. The jurisdiction of the District Court was invoked under the Federal Employers' Liability Act. On July 1, 1965, Union answered, denying negligence, and filed a third-party complaint against Swift & Company (pursuant to Federal Rules of Civil Procedure 14) seeking recovery over against Swift under a provision in

an industrial sidetrack agreement, which had been specially prepared and pasted onto a printed form, which required Swift to indemnify Union for loss "caused or contributed to by reason of" close clearances between Swift's mill and the sidetrack serving it. (The relevant portions of the agreement are set out in the opinions below, printed in the appendix hereto.)

The FELA action was tried to a jury, Swift participating, which returned a verdict against Union for One Hundred Twenty Thousand ($120,000.00) Dollars. Thereafter, additional testimony was introduced in the third-party action, which was tried to the court alone by agreement. (Neither Swift nor Union demanded a jury in the third-party action.) The District Court filed a memorandum decision on May 25, 1966, finding as a fact that Union's loss was "caused or contributed to" by the close clearance, and inferring from the terms of the agreement a "clear and unequivocal" intent to indemnify as required by Tennessee law. The court found such intent for the reasons stated in the opinion, one of the compelling reasons being the agreement would otherwise be rendered meaningless, and concluded that Union was entitled to recover over against Swift.

Swift appealed, and on April 12, 1968, the Court below reversed on the basis of *Brogdon* v. *Southern Railway Co.*, 384 F. 2d 220 (6th Cir. 1967), which had affirmed another district court's refusal to award indemnity under a different indemnity contract. The court below did not discuss the proper scope of review, did not consider whether the district court's findings or conclusions were clearly erroneous, and did not hold that the district court misapprehended the applicable rule of state law.

Considering the *Brogdon* decision as the applicable law, the court below engaged in a *de novo* application of Tennessee law to the agreement, reaching a conclusion different from the trial court's and reversed and remanded. In rendering its decision, the Court below did not question or disturb the trial court's finding that the loss clearly fell within the terms of the indemnity provisions and did not question or disturb the trial court's finding that the indemnity provisions would be rendered meaningless if it did not afford indemnity in this case.

Union filed a timely petition to rehear on May 21, 1968, urging that reversal in a diversity case could only be based on a determination that the result reached by the trial court was "clearly erroneous." Swift filed a response on request of the court below, on July 10, 1968. Union's petition for rehearing was denied, without argument or opinion, on July 26, 1968.

None of the three judges comprising the court below was from Tennessee.

REASONS FOR GRANTING THE WRIT

1. The rule of decision applied by the court below is in direct conflict with the decision in *United States v. Spicer,* 332 F. 2d 750 (10th Cir. 1964). In *Spicer,* the basic issue was whether the execution of joint wills had severed a joint tenancy with right of survivorship, under Kansas law. Kansas law provided that severance occurred only where the documents "clearly indicated" an intent to sever. In Kansas, this question was a matter for the court alone. The district court applied the Kansas rule to the documents, and found that a clear intent to sever did not appear. On appeal, the 10th Circuit held that such *finding* was not "clearly erroneous." 332 F. 2d at

754. The court below refused to apply the "clearly erroneous" standard to an identical determination.

2. Fed. R. Civ. Proc. 52(a) (printed in Appendix A, *infra*), provides that findings of fact by trial courts may not be overturned on appeal unless "clearly erroneous." The Sixth Circuit holds that 52(a) applies where state law allocates the determination to the trier of fact and not to the court. *Beaty* v. *Brock & Blevins Co.*, 319 F. 2d 43 (6th Cir. 1963). The Eighth Circuit holds with the court below that state law determines whether a particular determination is for the trier of fact. *National Life Insurance Co.* v. *Graham*, 301 F. 2d 439 (8th Cir. 1962). The Fourth and Fifth Circuits accord with the Tenth in holding that federal law controls this determination. *Burris* v. *Texaco, Inc.*, 361 F. 2d 169 (4th Cir. 1966); *Ammons* v. *Franklin Life Insurance Co.*, 348 F. 2d 414 (5th Cir. 1965).

Petitioner believes the decision below to be erroneous and the *Spicer* decision to be correct, both in applying 52(a) as a matter of federal law and in holding review of contractual inferences to be subject to 52(a). This court held in *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 94 (1931), that:

> "State laws cannot alter the essential character or function of a federal court. The function of a trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the court under either the Conformity Act or the Rules of Decision Act."

Herron held that a state constitutional provision forbidding directing a verdict of contributory negligence was not binding in a diversity case. Although pre-*Erie* (*Erie R.R.* v. *Tompkins*, 304 U. S. 64 [1938], the principle remains valid and applies equally to state decisional law; even un-

der *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842), state statutes and constitutions were followed in diversity cases. *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U. S. 525 (1958); *Diederich* v. *American News Co.*, 128 F. 2d 144 (10th Cir. 1942). The principle announced in *Herron* would seem to be equally applicable to a federal trial court's function in inferring intent from a contract, and to the function of a federal appellate court in reviewing that inference.

The decision below, in refusing to apply the "clearly erroneous" standard to the trial court's inference of contractual intent, also directly conflicts with this Court's holding regarding the scope of 52(a) in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394-395 (1948):

> "Insofar as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, . . . Rule 52(a) of the Rules of Civil Procedure is applicable. . . . A finding is 'clearly erroneous' when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The basic inference there at issue was whether a licensing agreement evidenced an intent to fix prices. This Court reversed the trial court's determination that no such intent appeared, but it did so because such was a *finding* "clearly erroneous" under 52(a).

Refusal by the court below to apply 52(a) in reviewing the trial court's inference of intent to indemnify from the terms of a contract is contrary to this Court's holding in *United States Gypsum, supra,* applicable in diversity cases under *Herron* v. *Southern Pacific Co., supra.*

3. Even assuming that the court below was correct in holding that the trial court's inference of contractual in-

tent was not a "finding of fact" within the meaning of 52(a), the court's refusal to apply the "clearly erroneous" standard to the determination of intent so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. It is a clear rule of decision among the Circuits that conclusions of trial courts based on the application of their state law, will not be reversed unless "clearly erroneous". This rule applies to a trial court's determination of the meaning of a contract under state law even in Circuits such as the Eighth which hold 52(a) inapplicable to such determinations. In this respect, the decision below directly conflicts with that of the Eighth Circuit in *Trans World Airlines* v. *Travelers Indemnity Co.*, 262 F. 2d 321 (8th Cir. 1959). The case arose under Missouri law, which requires that contracts provide for liquidated damages in "clear and unequivocal" terms before such provisions will be enforced. The trial court, sitting without a jury in a diversity case, determined that the contract was clear and unequivocal in this respect. In affirming, the Eighth Circuit held:

> "In construing this contract, the trial court determined, and we think correctly, that no ambiguity existed. There was, accordingly, no fact question for determination. . . .
>
> "Additionally, it should be noted that the construction and legal effect of this contract are determined by the law of Missouri. Unless it is demonstrated that the conclusion reached by the local federal judge is a legally unpermissible one or that by judicial decision, legislative enactment or other indication of Missouri law it is a clearly erroneous one, this court is bound to sustain."

Accord: *Hogue* v. *Pellerin Laundry Machinery Sales Co.*, 353 F. 2d 772 (8th Cir. 1965).

The Tenth Circuit, which views contractual inferences as "findings" under 52(a), also applies the "clearly erroneous" standard to trial court determinations based on state law which are "conclusions" rather than "findings". *First Security Bank of Idaho* v. *Crouse*, 374 F. 2d 17 (10th Cir. 1967).

The Second Circuit is in accord, and has stated a cogent reason for the rule in *Lomartira* v. *American Automobile Insurance Co.*, 371 F. 2d 550, 554 (2d Cir. 1967):

> "A court of appeals should not reverse the considered judgment of the district court on the law of its state unless it believes it to be clearly wrong.[6]
>
> "[Footnote] 6. Not infrequently, no member of the panel of a court of appeals is a member of the bar of the state whose law is in question. That is the case here."

The Fifth Circuit accords "great weight" to the trial court's conclusions. *Delduca* v. *U. S. Fidelity & Guaranty Co.*, 357 F. 2d 204 (5th Cir. 1966). The Ninth Circuit equates the two standards. *Bellon* v. *Heinzig*, 347 F. 2d 4 (9th Cir. 1965) (See footnote 3, 347 F. 2d at 6).

The refusal by the court below to apply the "clearly erroneous" standard in reviewing the trial court's decision directly conflicts with a settled and universally applied principle of appellate review. The decision below is at variance with the proper function of a reviewing court in our federal system, as defined by this Court in *United States* v. *Durham Lumber Co.*, 363 U. S. 522, 526 (1960):

> "Since the Court of Appeals is much closer to North Carolina law than we are, and since we cannot say that the court's characterization of the taxpayer's property interests under that law is clearly erroneous or unreasonable, the judgment is affirmed."

The court below, consisting of three judges from other states, refused to apply the clearly erroneous standard to the characterization of petitioner's contract rights under Tennessee law by a Tennessee judge. The reasons for this Court's holding in *Durham Lumber* apply with equal force to appellate review by federal courts of appeals in diversity cases; indeed, the Second Circuit so held in *Lomartira, supra.* This is particularly so where review is by a panel none of whom are from the state the law of which is being applied.

4. The court below has decided important questions of Tennessee law in a way which conflicts with applicable Tennessee decisions. The opinion below states that reversal was predicated on the court's prior decision in *Brogdon* v. *Southern Railway Co.*, 384 F. 2d 220 (6th Cir. 1967), which held an indemnity contract to be unclear and equivocal because:

> "The language of paragraph 4, however, makes no reference to saving Southern harmless from Southern's own negligence. . . . It would have taken little time for a Southern Railway attorney to have added the words 'including damage from indemnitee's own negligence' to the language of paragraph 4. Not finding such language (or any compelling inference), we decline to supply it." 384 F. 2d at 223.

In holding that such a contract must contain the magic words "including indemnitee's own negligence" to be enforceable, the decision placed a gloss on the Tennessee law which no Tennessee judge, including the district judge who decided *Brogdon* (see 253 F. Supp. 676 [E. D. Tenn. 1966]), has ever held to be Tennessee law. Indeed, the trial court's opinion in *Brogdon*, the opinion of the district judge below, and the Supreme Court of Tennessee, *Kroger Co.* v. *Giem*, 215 Tenn. 459, 387 S. W. 2d 620 (1965) (printed in Appen-

dix C, *infra*), have all held that a specific reference to the indemnitee's negligence is *not* required. Every court dealing with this question has held the Tennessee law to be as follows:

> "It is said, however, and rightly so, that a contract will not be so construed unless it was clearly intended to have that effect. This, of course, *does not mean that the intention must be expressed in terms,* but that if not so expressed it must otherwise clearly appear in the language used.
>
> "*When this rule is applied* to Article 30 we cannot see any intent, express *or implied,* to indemnify against indemnitee Kroger's proximate contributory negligence." (Emphasis supplied.) *Kroger Co.* v. *Giem,* 215 Tenn. 459, 472-473, 387 S. W. 2d 620 (1965), quoting from *Buckeye Cotton Oil Co.* v. *Louisville & Nashville R. Co.,* 24 F. 2d 347, 348 (6th Cir. 1928).

Quite obviously, the *Brogdon* decision goes far beyond requiring a clear *intent* to indemnify, in requiring express terms. The requirement is in direct conflict with *Kroger,* and its unwarranted engrafting upon the law of Tennessee resulted in the reversal below.

In rendering the decision below solely on the basis of its own decision in *Brogdon,* the court disregarded other rules applicable to the construction of Tennessee contracts. Tennessee follows the general rule of presuming that parties intend to enter into a meaningful contract so that "no substantive clause will be allowed to perish by construction, unless insurmountable legal obstacles stand in the way of any other course." *Associated Press* v. *WGNS, Inc.,* 48 Tenn. App. 407, 348 S. W. 2d 507, 512 (1961). Tennessee courts also subscribe to the proposition that even when interpreting contracts in the absence of parole evidence:

> "Contracts must be construed with reference to the situation and surroundings of the parties, the nature

> of the business in which they are engaged and to which the contract relates, and also with reference to the subject matter." *Southern Railway Co.* v. *Bacon*, 128 Tenn. 169, 171, 159 S. W. 602 (1913). Accord: *Commerce Street Co., Inc.* v. *Goodyear Tire & Rubber Co.*, 31 Tenn. App. 314, 329, 215 S. W. 2d 4 (1948).

The trial court, in its memorandum decision, found that the indemnity provision in question would be virtually meaningless if it were construed to be inapplicable where Union was negligent. This was practically conceded by Swift's counsel at the trial. (Appendix B, p. A4). The trial court's finding in this respect was based on the language of the contract when read in the context of the entire evidence, which included the nature of the parties' businesses, the circumstances existing at the time the contract was made (R. 296), and the fact that the indemnity provision was specially prepared and pasted into the contract (Appendix B, p. A5) following an injury to a railroad employee resulting from the identical close clearance which killed Eades. (R. 296). The trial court interpreted the contract in the light of these factors and rules, as was proper under the Tennessee authorities. The trial court noted in his memorandum decision that the indemnity provision construed in *Kroger* "had considerable room for application even if it did not give protection in the event Kroger was guilty of negligence" (Appendix B, p. A4), and was distinguishable on that ground.

Quite clearly, the district court's interpretation of the contract was at least permissible under Tennessee law, and was in no sense "clearly erroneous." On the other hand, the reversal by the court below, in misconstruing the *Kroger* case, and in ignoring "the entire evidence" and applicable Tennessee rules of contract interpretation, reached a result in clear violation of Tennessee law.

The two questions, whether indemnity contracts must contain express provisions regarding the indemnitee's negligence, and whether a construction will be chosen which renders the contract meaningless, are important ones which go to the heart of Tennessee rules of contract construction. The decision below is in direct conflict with applicable Tennessee authorities on these questions.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

COOPER TURNER, JR.
Counsel for Petitioner

APPENDIX A

Federal Rule of Civil Procedure 52(a)

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX B

Opinions Below

Memorandum Decision

(Filed May 25, 1966)

Joe C. Eades, an employee of defendant Union Railway, was killed on the job on November 10, 1964 while a member of a crew placing a car on a sidetrack alongside a Memphis plant of third party defendant Swift & Co. Thereafter Union tendered defense of this claim to Swift, relying on an indemnity provision in a sidetrack agreement, which Swift refused. An action was filed against Union under the F.E.L.A., which again tendered defense to Swift, and Swift again refused. Union thereupon filed a third party action for indemnity against Swift. A motion for severance by Swift was denied, and therefore the action and the third party action went to trial together and resulted in a jury verdict against Union in the amount of $120,000. As will be more fully developed later, no issues were submitted to the jury with respect to the third party action, and subsequent to the jury verdict, the court, without a jury, heard further proof and argument with respect to the third party action.

Union relies for indemnity on the last sentence in paragraph 6 of the sidetrack agreement, which reads as follows:

> "Shipper shall protect, indemnify and save harmless Railway Company against all loss, damage and expense in consequence of death of or injury to persons, whomsoever, and loss or destruction of or damage to property whatsoever, caused or contributed to by reason of the violation by Shipper of any of the provisions of this paragraph, or by reason of the existence, maintenance, use or operation of shipper's said existing facilities with lateral or overhead clearances as indicated on attached blue print."

Attached to the agreement is a blueprint showing the Swift plant and the sidetrack as they were located when the agreement was executed in 1953 and as they were still located at the time of the accident.

At the trial, with respect to the third party action, counsel for Swift sought a submission to the jury only of an issue as to whether the close proximity of the plant to the track, in the words of the indemnity provision, "caused or contributed" to the death of the deceased. However, since counsel for Swift had stipulated that Mr. Eades was killed when he was crushed between a boxcar and the plant building (which the proof in fact showed without dispute), the court ruled as a matter of law that the proximity of the building to the track "caused or contributed" to the death within the meaning of the indemnity provision and therefore did not submit the issue. Moreover, counsel for Union and Swift stipulated that any other issues of fact with respect to the third party action would be submitted on further proof to the court for determination in the event that the jury found against Union in the F.E.L.A. action. As stated, this proof has been taken and argument heard.

Swift first contends that the above-quoted indemnity provision does not apply here because the jury of necessity determined that Union was guilty of negligence and that the provision, properly construed, does not create a right to indemnity where the indemnitee was guilty of negligence. In this connection, Swift relies on *Kroger Co.* v. *Giem*, ... Tenn. ....., 387 S.W.2d 620 (1965), which holds that though an agreement may effectively provide for indemnity irrespective of negligence of the indemnitee, it must do so in clear and unequivocal terms. The provision here, Swift contends, is not clear and unequivocal because it does not contain such words as "irrespective of negligence on the part of the Railway Company." However, the Tennessee

Supreme Court in the *Kroger* case cites and approves of the holding of our Court of Appeals in *Buckeye Cotton Oil Co.* v. *L. & N. R.R. Co.*, 24 F.2d 347 (6th Cir. 1928), which deals with an indemnity provision very close in wording to the provision in the instant case and which is certainly no more clear and unequivocal. There it was held that the provision created a right to indemnity in spite of the negligence of the railroad. Moreover, the indemnity provision in the *Kroger* case, which was aimed to protect Kroger against damage to its property under construction by the defendant-indemnitor, had considerable room for application even if it did not give protection in the event Kroger was guilty of negligence. On the other hand, in the instant case, if the railroad was to have no protection in the event of injury to or death of a person if the railroad was guilty of negligence, the indemnity provision would be almost meaningless; the only situation Swift's counsel can think of in which Union would be protected would be as to a workman's compensation claim by an employee who was not in interstate commerce and therefore not covered by the F.E.L.A., and even here there would be no protection if the railroad was in fact negligent. All F.E.L.A. claims by employees and all common law claims by non-employees would be outside the ambit of this indemnity provision.

Swift further argues, in support of its construction of the above-quoted indemnity provision, that the fact that the more general indemnity provision, contained in paragraph 5 of this sidetrack agreement, provides for equal responsibility in the event both Union and Swift are negligent is an indication that the parties intended that there would be no indemnity under the above-quoted provision of paragraph 6 if Union was negligent. In other words, as we understand Swift's contention, this shows that the parties had negligence in mind and that if they had intended

that Union have indemnity under the above-quoted provision irrespective of its negligence, they would have said so. But it can just as reasonably be argued that this shows that if the parties had intended that there be no indemnity under the above-quoted provision if Union was negligent, they would have said so in that provision.

We therefore conclude that, under a proper construction of the above-quoted provision of paragraph 6, Union is entitled to full indemnity irrespective of its negligence.

Separate and apart from its arguments as to the construction of the above-quoted provision in paragraph 6, Swift argues that, in any event, the general indemnity provision in paragraph 5 is the applicable provision here because it is in conflict with the provision in paragraph 6 and the ambiguity should be resolved in favor of Swift which did not prepare the document. (Swift then goes on to argue that, applying paragraph 5, it does not even have to share responsibility with Union, even if we found that Swift was guilty of negligence, because Union's negligence was "active" and its negligence would be "passive.") It does appear that the agreement is on a Union printed form, but it does not appear who prepared paragraph 6 which was pasted in; in any event, it would not be realistic to give this principle of construction much force where, as here, we are dealing with an agreement between two sizeable corporations. Moreover, and more important, paragraph 6 should under another rule of construction be treated as the applicable provision because it was especially prepared and pasted on the printed form and because it specifically deals with this very situation—i.e. an injury and death caused or contributed to by the proximity of the building to the track.

Next, Swift argues that the general indemnity provision in paragraph 5 should be applied here, thus denying full

indemnity to Union, because Union acquiesced in this condition, relying on *Pennsylvania Railroad Co.* v. *Erie Avenue Warehouse Co.*, 302 F.2d 843 (3rd Cir. 1962). There the Court of Appeals for the Third Circuit, applying Pennsylvania law, did reach this result. However, from our reading of that case, we do not gather that in the indemnity agreement the parties, as here, expressly recognized a particular existing dangerous condition *which was to continue* and contracted for full indemnity in the event that an injury or death resulted from that condition. Moreover, as shown by the *Buckeye* and *Kroger* cases, there is no Tennessee public policy against such an agreement.

We therefore conclude that the above-quoted specific indemnity provision contained in paragraph 6, rather than the general provision for sharing responsibility where both parties are negligent contained in paragraph 5, is applicable here and therefore it is not necessary to make a finding as to whether Swift was negligent.

Aside from its arguments having to do with the construction of the indemnity provisions in the agreement, Swift contends that it should not be required to indemnify Union because Union breached its obligations as an indemnitee to Swift as an indemnitor and further is estopped to seek indemnity. More particularly, Swift contends (1) that Union misled it to think that it had no contractual indemnity obligation to Union which caused it (a) to reduce its investigation efforts and (b) to fail to seek a settlement of the claim with the widow Eades prior to her employment of counsel, and (2) that Union failed to cooperate with it by not furnishing Swift the product of its investigation and by refusing to allow the interviewing of Union's employees. There does not appear to be much law on this general subject, and what law there is we find in *Illinois Central R. Co.* v. *Blaha*, 73 A.L.R. 2d 495, 89 N.W.2d 197

(Wis. 1958), and the Annotation accompanying this case. It does appear that an indemnitee owes an indemnitor a duty to give reasonable notice of an action filed against the indemnitee. If this be the only duty of the indemnitee to the indemnitor, then certainly there was no breach of duty here, for it is without dispute that after the accident in November, 1964, Union tendered defense to Swift in March, 1965 and again in June, 1965, when the action was filed against Union, and that counsel for Swift participated in the defense of Union at the trial and even argued Union's non-liability to the jury. We will, however, explore Swift's contentions in this area and demonstrate that there is nothing to them.

It appears that Union is a wholly owned subsidiary of Missouri Pacific Railroad. It further appears from the testimony of the Retail Credit investigator employed by Swift's insurance carrier and from the testimony of the regional claims manager of this insurance company, and it is without dispute, that the newspaper account and the Eades death certificate showed Eades as a Missouri Pacific employee and that a claim agent of Missouri Pacific so advised the investigator. It should be noted that none of this information came from Union. On the other hand, it also appears that Swift knew that only two railroads had been putting cars on this sidetrack, the "Frisco" and Union, which were the only railroad parties to the sidetrack agreement, and that in December, 1964, Swift paid a November demurrage charge to Union. It further appears that no person connected with Swift ever inquired of Union or its local lawyers as to whether Eades was a Union employee. In any event, Swift contends that, erroneously thinking that Eades was a Missouri Pacific employee, it assumed it could have no obligation under the indemnity agreement to Union. However, Swift's obligation under the agreement did not turn upon whose employee Eades was but rather

upon whose train was involved in the accident, and it was at least possible that a Missouri Pacific employee could have been killed by a Union train. The insurance investigator also testified that in early December, 1964, when he interviewed the Union claim agent (at which interview he did not ask the claim agent whether Eades was a Union employee), he was advised by the claim agent that he had read the sidetrack agreement and that Swift had no obligation thereunder and should not be concerned. The claim agent denied this; he testified that at that time he actually did not know of the existence of the sidetrack agreement but that, even so, he did not tell the investigator that Swift could have no obligation in the matter. We find that the claim agent made no such statement to the insurance investigator because if in fact he did have the agreement and had read it, it would have been obvious that Swift was involved, and if he did not, as he testified, then know of the existence of the agreement, he certainly would not have said that he had read the agreement and that Swift had no responsibility. Moreover, it is difficult for us to imagine that a railroad claim agent of twenty years experience would ever in this situation tell a shipper's representative that the shipper had no responsibility, even in the absence of an indemnity agreement, because the railroad could still seek non-contractual indemnity or contribution under the law of Tennessee. *Huggins* v. *Graves*, 210 F. Supp. 98 (D. C. Tenn. 1962); *Chamberlin* v. *McCleary*, 217 F. Supp. 591 (D. C. Tenn. 1963).

Even if we assume that Swift was without fault in concluding that it had no contractual indemnity obligation and that Union with fault so misled Swift, it is difficult to see any proximate harm to Swift. Swift had notice of the accident within minutes and an investigation was shortly begun in its behalf. The possibility of a noncontractual obligation to idemnify or to make a contribution (see *Huggins*

and *Chamberlin*, supra) should have caused it to investigate the facts of the accident thoroughly. In short, if Swift was serene it was foolish. Moreover, while it is true that Union's thorough investigation was aimed to support its defense against the widow Eades and not Swift's defense against it, Swift in any event had the benefit of this investigation in the defense of Union's primary liability to the widow Eades. With respect to Swift's contention that it was prejudiced because it would have sought a settlement with the widow Eades before she employed counsel, the answer is that the widow demanded $135,000 before she employed counsel.

Swift also claims that it was prejudiced because Union failed to cooperate with it. At the outset it should be noted that, unless Swift accepted the defense of the claim, which it never did, Union and Swift had adverse positions. Swift contends, however, that Union failed to cooperate prior to the first tender of the claim in March, 1965, and we assume, *arguendo*, that Union had an affirmative duty to cooperate prior to the first tender and refusal. In this connection, the insurance investigator testified that when he interviewed the Union claim agent in early December, 1964, the claim agent refused to show him his investigation file and told him that he could not interview Union's employees and that if they did talk to the investigator they would be fired. We find that the claim agent did tell the investigator that he could not see the file unless permission was received from the claim agent's superiors, that the claim agent did give the investigator the names of the witnesses including Union's employees, and that he did tell the investigator that he would not be allowed to interview the employees while they were at work. This is not a failure to cooperate.

We therefore find and conclude that Union is entitled to full indemnity, including Union's attorney's fee of $4,500, which has been stipulated so proper, and including Union's expenses, which we understand will be stipulated.

An order will be prepared by counsel for entry.

This 25 day of May, 1966.

Bailey Brown, Judge
United States District Judge

Opinion of the Sixth Circuit

United States Court of Appeals

SIXTH CIRCUIT.

Helen EADES, Administratrix of the
Estate of Joe Carroll Eades,
Plaintiff-Appellee,

v.

UNION RAILWAY COMPANY, Defendant
and Third-Party Plaintiff-Appellee,

v.

SWIFT & COMPANY, Third-Party
Defendant-Appellant.

No. 17512.

April 12, 1968.

Rehearing Denied July 26, 1968.

William M. Fitzhugh, Memphis, Tenn., Evans, Petree, Cobb & Edwards, Memphis, Tenn., on brief, for Swift & Co.

James W. McDonnell, Jr., Memphis, Tenn., Canada, Russell & Turner, Memphis, Tenn., of counsel, for Union Ry. Co.

Before O'SULLIVAN, McCREE, and COMBS, Circuit Judges.

PER CURIAM.

This is an appeal from a judgment of the District Court that the Union Railway Company is entitled to indemnifi-

cation by Swift & Company for the damages awarded to Helen Eades in a suit brought by her against the railroad for negligently causing the death of her husband.

Mr. Eades was crushed to death between the Union train and the wall of a Swift feed mill. The clearance between the track and the wall was particularly narrow, and Swift and Union had entered into an agreement which provided as follows:

> 6. Shipper shall not erect or maintain, or allow to be erected or maintained, any building, structure or fixture, or place or store, or allow to be placed or stored, material of any kind, adjacent to or over said track at distances less than those prescribed by lawful authority; and in no event shall any such building, structure, fixture or material be erected, maintained, placed or stored within eight and one-half (8½) feet of the center line of said track or at a height of less than twenty-three (23) feet above the top of the rails of said track; except as to wires, the overhead minimum clearance of which shall be in accordance with specifications of the current National Electrical Safety Code, and in no case less than twenty-seven (27) feet above the top of the rails of said track, except, however, Shipper shall have the right to maintain its existing facilities adjacent to said track with lateral and overhead clearance less than those above prescribed, all as more particularly indicated on the attached blue print, [including the clearance involved in this case] upon the express condition, however, that Shipper shall at Shipper's cost, erect and maintain suitable warning signs at points satisfactory to Railway Company for the purpose of warning employees of Railway Company of the location and proximity of said facilities to said track. Shipper shall protect, indemnify and save harmless Railway Company against all loss, damage and expense in consequence of death of or injury to persons, whomsoever, and loss or destruction of or damage to property whatso-

> ever, caused or contributed to by reason of the violation by Shipper of any of the provisions of this paragraph or by reason of the existence, maintenance, use or operation of shipper's said existing facilities with lateral or overhead clearances as indicated on attached blue print.

The District Court held that under this agreement Union Railway Company was entitled to be indemnified even though the damages were the result of the railroad's sole negligence.

[1, 2] Subsequent to the District Court's decision, we had occasion to consider a similar indemnity provision in Brogdon v. Southern Railway Co., 384 F.2d 220 (1967) and in Southern Railway Co. v. Foote Mineral Co., 384 F.2d 224 (1967). That provision read as follows:

> The party of the second part will, moreover, indemnify and save harmless the Railway Company from and against the consequences of any loss of life, personal injury, or property loss or damage which may be caused by, result from, or arise by reason of or in connection with, any limited or restricted clearances for said industrial tracks.

Tennessee law was controlling in *Brogdon*, as it is here. We held in *Brogdon* that the law of Tennessee requires clear and unambiguous language if a contractual provision is to be regarded as indemnifying against the indemnitee's own negligence. Kroger Co. v. Giem, 215 Tenn. 459, 387 S.W.2d 620 (1964). The language in the *Brogdon* provision was held not to have met this requirement and we find no significant distinction between the *Brogdon* provision and that involved here.

The judgment of the District Court is reversed and the case is remanded for proceedings consistent with this opinion.

APPENDIX C

Conflicting Opinion

THE KROGER COMPANY, Plaintiff in Error,

v.

SETH E. GIEM, Individually and dba SETH E. GIEM & ASSOCIATES, and JOHN E. BOUCHARD & SONS CO., INC., Defendants in Error.

(*Nashville*, December Term, 1964.)

Opinion filed November 12, 1964.

Petition for Rehearing Denied February 4, 1965.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Court of Appeals affirmed the trial court in approving the verdict of the jury which found all issues against the plaintiff and in favor of the defendants. We *granted certiorari and* the case has been argued at the bar of this Court.

The Kroger Company commenced an action for unliquidated damages against the defendants, wherein it sought to recover upon two theories, one sounding in tort and the other in contract, upon the following state of facts:

The Kroger Company (Kroger) let a written contract to Seth Giem and Associates, of Memphis (Giem) for certain additions and remodeling to Kroger's Nashville warehouse.

Giem sub-contracted part of the work to John E. Bouchard & Sons Company, Inc. (Bouchard).

A few days before the actual signing of the contract with Kroger, there was a conference between the officials

of Giem and Kroger at its home office in Cincinnati. In this conference Giem requested that he and his sub-contractors be named on Kroger's insurance certificate and receive "protection like Kroger". In response to this request a letter was written to Giem, under the date of August 26, 1957, in which it was said:

> "Attached hereto, Certificate of Insurance naming your company as an additional insured under The Kroger Company's blanket fire and extended coverage insurance. This insurance will cover your interest at our warehouse location in Nashville, Tennessee.
>
> "Although our contractual agreement does not specify that the general contractor will be named as an additional insured under the builders risk policy, we do protect the contractor when requested to do so by naming him as an additional insured. It is not our policy, however, to extend this coverage to the sub-contractors.
>
> "I trust that you will find the attached certificate satisfactory."

The above letter was signed by an official in the insurance department of Kroger. There is no dispute about this letter having been sent to and received by Giem.

Giem sub-contracted part of the work to Bouchard and in performing its contract two of Bouchard's employees, while in the process of cutting a hole through the roof of the warehouse to install a vent pipe, in which they were using an acetylene torch, allowed molten metal sparks to fall upon some highly flammable insulation material which caught fire and burned intensely, or as some witnesses said "exploded" like gasoline. Two large stacks of this material had been stored inside the warehouse to be used in insulating freezer and banana rooms. The fire, water and smoke

damage to the Kroger warehouse and grocery stock was quite extensive.

The first count of the declaration is a common law count against both defendants, alleging that both were negligent in the storing and igniting of large quantities of insulation material resulting in damage to the plaintiff's warehouse in the amount of $775,000.00.

The declaration specifically charged that the defendants were guilty of gross negligence in that (1) they did not properly supervise the work; (2) they did not remove flammable material from the area where the work was to be done; (3) they neglected to cover the flammable material to keep sparks from the cutting operation from falling on it; (4) they failed to have a watchman close by; and (5) they did not properly coordinate the work with the result that the flammable insulation material had to be stored in the warehouse while the work was going on.

The second count of the declaration is against Giem only, and is for an alleged violation of Article 30 of the building contract between Giem and Kroger, which reads:

> "The contractor shall continuously maintain adequate protection of all his work from damage and shall protect the owner's property from injury arising in connection with this contract. He shall make good and hold the owner harmless from any such damage or injury."

Giem filed a general plea of not guilty and then by special plea alleged that Kroger was guilty of contributory negligence. By amended plea and replication Giem contended that Kroger had agreed to maintain insurance for his benefit to the value of the property involved. Giem claimed that since he was a named insured in the policy there could be no recovery against him because this would

permit the insurance company, Lloyds of London, to be subrogated against its own insured. Giem was thus taking the position that he occupied the same relationship with Lloyds of London as Kroger did under its general insurance policy issued by this insurance company.

Giem contended that the indemnity provision relied on in the second count of the declaration could not be construed so as to indemnify Kroger because its negligence contributed to the loss.

Bouchard filed pleas of not guilty and then by special pleas contended that Kroger was guilty of contributory negligence in storing the flammable insulation material where work was to be done and further that as a subcontractor it was entitled, under the contract, to the benefit of Giem's agreement with Kroger with respect to being included as an additional insured under Kroger's insurance policy with Lloyds of London.

After an extended period of proof the case was submitted to a jury under instructions to find a general verdict and also to report in respect to certain special issues. Upon consideration thereof the jury returned a general verdict in favor of both defendants and reported the special issues as follows:

That both defendants were guilty of negligence proximately causing the damages and losses as set out in the declaration. The jury found that Kroger was guilty of negligence proximately causing the losses and damages set out in the declaration. In other words the jury found the plaintiff and both defendants guilty of negligence which proximately caused or contributed to the damages and under the general charge of the court, and the general verdict of the jury, this merely meant that the plaintiff could not recover and that its suit was dismissed.

The jury also reported on certain matters with respect to the contract between Kroger and Giem by which it found that Kroger was required to carry insurance to protect the defendant Giem from loss by negligent destruction by fire of the partially completed improvement; that Kroger was required to carry insurance to protect the defendant Giem from having to pay Kroger for the negligent destruction by fire of the part of the warehouse in which the new renovation was being performed; that Kroger was required to carry insurance to protect the defendant Giem from having to pay Kroger for negligent loss by fire of merchandise, equipment, supplies stored in said warehouse; and that Kroger was required to carry insurance to protect the defendant Giem from having to pay extra expense incurred by Kroger as a result of the negligently caused fire.

The jury was also asked to respond to a special issue of whether or not it found from a preponderance of all of the evidence that the Kroger Company, its servants, agents or employees, was in actual charge and control of the construction work. In response to this interrogatory, the jury answered yes.

From a recitation of the foregoing, it can be seen that we are confronted with two questions. First, is there material evidence in the record to sustain the verdict of the jury, the judgment of the trial court thereon, and the judgment of the Court of Appeals in finding and holding that Kroger was guilty of such contributory negligence as would bar recovery. The second question is whether said Article 30 of the general contract, whereby Giem agreed to indemnify Kroger, entitles Kroger to recover from Giem as a matter of law.

[1] In considering the question of contributory negligence of Kroger, we do so with the knowledge that the jury returned an affirmative reply to the special issue submitted to it as to whether or not Kroger, its agents or employees, were guilty of negligence proximately causing the losses and damages complained of in the declaration.

[2, 3] In making this determination we must construe the evidence most favorably to the defendants here and allow all reasonable inferences which tend to uphold the verdict of the jury. It is the duty of the jury to consider all of the evidence and to settle the differences that may develop therefrom. Upon appeal here we assume that all such differences have been settled by such verdict, and we have only to decide whether the circumstances of the case were sufficient in point of law and reason to permit the jury to find and reach such a verdict. *Spivey* v. *St. Thomas Hospital,* 31 Tenn.App. 12, 211 S.W.2d 450 (1948).

[4] In judging whether there is sufficient material evidence to support the verdict of the jury, the reviewing court is required to look to all the evidence, construe it most strongly in favor of the successful party below; take as true that which has a tendency to support the verdict of the jury; and to discard all countervailing evidence and allow all reasonable inferences to be drawn from such evidence in favor of the defendants here. *City of Winchester* v. *Finchum,* 201 Tenn. 604, 301 S.W.2d 341 (1957); *Smith et al.* v. *Sloan,* 189 Tenn. 368, 225 S.W.2d 539; 227 S.W.2d 2 (1949); *Rose & Co.* v. *Snyder,* 185 Tenn. 499, 206 S.W.2d 897 (1947); *Osborn* v. *City of Nashville,* 182 Tenn. 197, 185 S.W.2d 510 (1945); *Sneed* v. *Henderson,* 211 Tenn. 572, 366 S.W.2d 758 (1962); and many other cases.

In determining whether there is any material evidence to support the jury verdict, we have read the testimony of Mr. Delbert Thomas, an inspector for the plaintiff, in which he said that his duties included visits to various projects (of Kroger) to make visual observations as to what had been accomplished and also to determine whether the work was being performed in accordance with contractual requirements. Mr. Thomas said also that he had contact with most of the sub-contractors on this particular job during the course of the project. All parties agreed that he was in the warehouse at the time of the fire.

Mr. Bouchard, of Bouchard & Sons Company, said that Mr. Thomas was more than a mere inspector on the job. He testified that Thomas was expediting the work and dictating how it was to be done. He also said that Mr. Thomas had called him on numerous occasions and asked him to come by the job and go over certain matters and details with reference to the construction of the addition to the warehouse.

The superintendent of Giem, a Mr. Hudson, said that Thomas was primarily the boss of the operation and that he got his orders, information and authority from Mr. Thomas.

Hudson testified that the progress schedule was made up by Kroger Company and that Mr. Thomas would tell them when to start each job. He recalled that on the morning of the fire that Mr. Thomas was out in the warehouse expediting the placement of a drain. Thomas also told Hudson, according to his testimony, to move certain equipment to provide space for the storage of the insulation materials, which later was set fire and exploded.

Raymond Welch, of Giem, stated that when the insulation arrived he approached Mr. Thomas to have him arrange space for the insulating material to be stored.

Mr. Giem testified that Kroger was in complete charge of all shipping schedules and had set the date for the shipping of the insulation material, which was not supposed to have arrived until March 24, 1958, but began to arrive on February 26, 1958 for some reason unexplained in the record.

[5] We think from reading the testimony that Mr. Delbert Thomas performed the duties of a supervisor, or expediter, for Kroger and took an active part in running the job. The evidence also supports the conclusion reached by the jury that the Kroger Company, acting through Mr. Thomas as the supervisor, expediter, or overseer of the job, was proximately contributorily negligent, thereby barring a recovery.

The record shows a considerable amount of conflict in the testimony concerning the duties of Mr. Thomas, but we feel there is substantial evidence that Mr. Thomas was the active supervisor of the work, set up a time schedule for the progress of the work, ordered materials, ordered the insulation in question, which he knew or should have known was highly flammable. Despite this, he ordered said insulation material stacked in the warehouse where construction work was being done and, as a matter of fact, was present on the job in the warehouse at the time of the fire.

The jury no doubt concluded that Mr. Thomas had charge of the construction and that the duties of Giem and Bouchard were carried out under his control and direction.

[6] The question of whether or not the "no smoking" signs which had been placed upon the material was a suf-

ficient warning to Bouchard and to Giem so as to relieve Kroger from being considered contributorily negligent was a question of fact for the jury and, of course, the jury determined this question against Kroger.

Kroger contends that the storage of the insulation material was a mere condition and not a direct and proximate cause of the fire. In support of this contention the cases of *Ward* v. *University of the South,* 209 Tenn. 412, 354 S.W.2d 246 (1962); *Ford Motor Co.* v. *Wagoner,* 183 Tenn. 392, 192 S.W.2d 840, 164 A.L.R. 364 (1946); and *Moody* v. *Gulf Refining Co.,* 142 Tenn. 280, 218 S.W. 817, 8 A.L.R. 1243 (1920), are cited.

[7] In *Moody* v. *Gulf Refining Co.,* supra, the defendant was absolved of liability because, although negligent in spilling gasoline, the company could not have reasonably anticipated that any one would throw a lighted match into the gasoline during the absence of Gulf employees. In the present case we have a highly flammable material stored by Kroger in the immediate area where the evidence shows that construction work, requiring the use of welding and cutting torches, was going on and where it could have and should have been reasonably anticipated that such operation might ignite this material. The jury so found.

In *Ford Motor Company* v. *Wagoner,* supra, we held that liability should be fastened on the last conscious agency which might or should have averted the mischief. However, we went on to say that the intervening act of an independent conscious agency would not relieve the wrongdoer unless it appeared that the negligent intervening act of commission or omission could not have been reasonably anticipated. We think the act of commission in the present case could have been and should have been anticipated.

[8] In *Ward* v. *University of the South*, supra, the Court said that where two distinct causes, unrelated in operation, contribute to an injury, one of them being a direct cause and the other furnishing the condition by which the injury was made possible, the former alone is responsible for the result. But, we think that the storage of the insulation material in the presence of construction work, which the defendants were required to carry on, cannot be said to be "unrelated in operation" so as to make the act merely a condition and not a direct and proximate cause. As a matter of fact, the very purpose of the storing of the material was to provide for its ready use when needed as well as to accommodate Kroger in use of space in the warehouse.

[9] It is well settled that only where reasonable minds may draw but one conclusion from proven facts, that then and only then the determination of the question of proximate cause is for the court. *Illinois Central R. Co.* v. *Nichols*, 173 Tenn. 602, 118 S.W.2d 213 (1938).

[10, 11] Proximate cause need not be the last act, the one nearest to the injury or damage, or the sole cause. Proximate cause means that which is the procuring and efficient cause of the accident, and indicates nearness in causal relation. *Grigsby & Co.* v. *Bratton*, 128 Tenn. 597, 163 S.W. 804 (1914).

[12] We think the putting of the flammable material in the place where it was known that construction work of the type involved was going on constituted a procuring and efficient cause which a jury could, under a proper charge from the court, deem to be proximate.

We are convinced from reading this record that the Court of Appeals was correct in affirming the judgment of the trial court in finding for the defendants on the common law count of negligence.

The question then remaining is whether Giem is liable by reason of his agreement to indemnify Kroger as set forth in Article 30 of the contract quoted above.

[13] The Court of Appeals said, and we agree to its correctness, that it is nearly a universal rule that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by "clear and unequivocal terms;" and general words will not be read as expressing such an intent. 42 C.J.S. Indemnity sec. 12, pp. 580-581; 27 Am.Jur. Indemnity, sec. 15, pp. 464-465; 175 A.L.R. sec. 19, pp. 34-37. The only case from this State which discusses this rule, which has been cited or which we have been able to find, is *Buckeye Cotton Oil Co.* v. *Louisville & Nashville R. Co.*, 24 F.2d 347, 348 (6th Cir.). In that case it is said:

> "There was no rule of public policy which forbade the railroad company from contracting with the oil company for indemnity against any damages which the railroad might be required to pay as the result of the ordinary negligence of its employees in operating engines and cars on these tracks. * * * It is said, however, and rightly so, that a contract will not be so construed, unless it was clearly intended to have that effect. This, of course, does not mean that the intention must be expressed in terms, but that, if not so expressed, it must otherwise clearly appear in the language used."

[14] When this rule is applied to Article 30 we cannot see any intent, express or implied, to indemnify against indemnitee Kroger's proximate contributory negligence.

In reaching this conclusion we have considered the cases cited by Kroger: *Southern Natural Gas Co.* v. *Wilson*, 304 F.2d 253 (5 C.A.1962); *General Accident Fire & Life Assurance Corp.* v. *Smith & Obey Co.*, 272 F.2d 581, 77

A.L.R.2d 1134 (6 C.A. 1959); *Macon* v. *Warren Petroleum Corp.*, 202 F.Supp. 194 (W.D.Tex.1962); *National Surety Corp.* v. *Erskine & Sons, Inc.*, 188 F. Supp. 687 (N.D.Ohio 1960), and we are of the opinion that these cases are distinguishable because of their particular indemnity contract provisions or because they depart from the general rule as understood by us.

The question of whether Giem and Bouchard were additional insureds under Kroger's policy is not material and has not been considered by us in the view that we take of the determinative issues in this case.

The record in this case, consisting of more than 1400 pages, has been carefully reviewed, the extremely able and exhaustive briefs have been read with great interest, from all of which we are firmly convinced of the correctness of the action of the lower courts.

The judgment of the Court of Appeals is affirmed.

BURNETT, CHIEF JUSTICE, and FELTS, DYER and HOLMES, JUSTICES, concur.

On Petition to Rehear

MR. JUSTICE WHITE.

We consider the petition to rehear as being a restatement of the excellent briefs and arguments in support thereof heretofore filed by counsel.

We have reviewed our opinion and the authorities cited and relied on for our conclusions set forth therein.

After thorough and earnest consideration of this matter for the third time, once when considering the petition for certiorari, secondly when preparing our opinion, and now finally, on the petition to rehear, we are firmly con-

vinced of the correctness of our opinion as originally prepared and it would serve no useful purpose to repeat the reasons given to support it in this opinion on petition to rehear.

Therefore, the petition is denied.